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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

State of California, *et al.*,
Plaintiffs,

v.

Andrew Wheeler, *et al.*,
Defendants.

Case No. 3:20-cv-3005-RS

**[PROPOSED] STATE
INTERVENORS' ANSWER**

Hr'g Date: June 18, 2020
Hr'g Time: 1:30pm
Dep't: San Francisco Courthouse,
Courtroom 3, 17th Floor
Judge: Honorable Richard Seeborg
Action Filed: May 1, 2020

Intervenor-Defendants, the States of Georgia, West Virginia, Alabama, Alaska, Arkansas, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming (the “State Intervenor”), through undersigned counsel, answer the complaint in this action as follows:

1. Paragraph 1 characterizes Plaintiffs’ lawsuit and does not require a response. To the extent a response is required, the State Intervenor admits that the United States Environmental Protection Agency (“EPA”) and the United States Army Corps of Engineers (collectively, the “agencies”) published a rule entitled “The Navigable Waters Protection Rule: Definition of ‘Waters of the United States’” (“2020 Rule”) on April 21, 2020. *See* 85 Fed. Reg. 22,250 (Apr. 21, 2020). The State Intervenor denies that the Plaintiffs are entitled to the relief they seek.

2. Paragraph 2 consists of opinions and legal conclusions to which no response is required. To the extent a response is required, the State Intervenor admits that the 2020 Rule defines the term “waters of the United States” for purposes of the Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.*

3. Paragraph 3 consists of characterizations, opinions, and legal conclusions to which no response is required. Paragraph 3 also characterizes and selectively quotes from statutory authority, which is publicly available, speaks for itself, is the best evidence of its contents, and to which no response is required.

4. Paragraph 4 consists of opinions and legal conclusions to which no response is required. Paragraph 4 also characterizes and cites the Federal Register, which is publicly available, speaks for itself, and is the best evidence of its contents.

5. The State Intervenor admits the following allegations in Paragraph 5: The agencies promulgated a rule, “Definition of ‘Waters of the U.S.’”—Recodification of Pre-Existing Rules,” 84 Fed. Reg. 56,626, on October 22, 2019 (“Repeal Rule”). The Repeal Rule repeals an earlier regulation, “Clean Water Rule: Definition of ‘Waters of the U.S.’,” 80 Fed. Reg. 37,054 (June 29, 2015) (“2015 Rule”), and restores the legal status quo that existed prior to the 2015 Rule. The

1 remainder of Paragraph 5 consists of characterizations and legal conclusions to which no
2 response is required.

3 6. Paragraph 6 consists of opinions, characterizations, and legal conclusions to which
4 no response is required. To the extent a response is required, the State Intervenor's admit that the
5 2020 Rule replaces the 2019 Rule with a revised definition of "waters of the United States" for
6 purposes of the CWA. They further admit that coverage of the 2020 Rule is different from that of
7 the 2015 Rule as well as the pre-2015 regulatory regime, and further admit that some features
8 covered by those regimes would not be jurisdictional under the 2020 Rule. The State Intervenor's
9 deny the remaining allegations in Paragraph 6.

10 7. Paragraph 7 consists of opinions, characterizations, and legal conclusions to which
11 no response is required. Paragraph 7 also characterizes and cites to a legal opinion, which is
12 publicly available, speaks for itself, and is the best evidence of its contents.

13 8. Paragraph 8 consists of opinions, characterizations, and legal conclusions to which
14 no response is required. To the extent a response is required, the State Intervenor's deny the
15 allegations in Paragraph 8.

16 9. Paragraph 9 consists of opinions, characterizations, and legal conclusions to which
17 no response is required. To the extent a response is required, the State Intervenor's deny the
18 allegations in Paragraph 9.

19 10. Paragraph 10 consists of opinions and legal conclusions to which no response is
20 required. To the extent a response is required, the State Intervenor's deny that the 2020 Rule
21 exposes the Plaintiffs to pollution, places Plaintiffs at a competitive disadvantage, or injures the
22 Plaintiffs' sovereign or proprietary interests. The State Intervenor's lack sufficient information to
23 respond to the allegation regarding the ability of the Plaintiffs to manage their regulatory
24 programs, and deny the remaining allegations in Paragraph 10.

25 11. Paragraph 11 consists of opinions, characterizations, and legal conclusions to which
26 no response is required. To the extent a response is required, the State Intervenor's deny the
27 allegations in Paragraph 11.

1 12. Paragraph 12 consists of a characterization of the Plaintiffs' lawsuit and the relief
2 sought therein. To the extent a response is required, the State Intervenor deny Plaintiffs are
3 entitled to the relief sought in Paragraph 12.

4 13. Admitted.

5 14. Admitted.

6 15. Admitted.

7 16. The State Intervenor admit that the State Plaintiffs are sovereign states of the United
8 States of America. They further admit that the North Carolina Department of Environmental
9 Quality is an executive agency of the State of North Carolina, that the District of Columbia is a
10 municipal corporation and is the local government for the territory constituting the permanent
11 seat of the government of the United States, and that the City of New York is a municipal
12 corporation and political subdivision of the State of New York. The State Intervenor lack
13 sufficient information or knowledge to admit or deny the truth of the remaining allegations in
14 Paragraph 16.

15 17. Admitted.

16 18. Admitted.

17 19. Admitted.

18 20. Admitted.

19 21. Paragraph 21 states a legal conclusion to which no response is required.

20 22. Paragraph 22 states a legal conclusion to which no response is required. Paragraph
21 22 also quotes from 5 U.S.C. § 551(5), which speaks for itself, is the best evidence of its
22 contents, and to which no response is required.

23 23. Paragraph 23 states a legal conclusion to which no response is required. Paragraph
24 23 also selectively quotes from statutory authority, which is publicly available, speaks for itself,
25 and is the best evidence of its contents.

26 24. Paragraph 24 states a legal conclusion to which no response is required.
27
28

1 25. Paragraph 25 consists of legal conclusions to which no response is required.
2 Paragraph 25 also quotes 5 U.S.C. § 553(c), which is publicly available, speaks for itself, and to
3 which no response is required.

4 26. Paragraph 26 states a legal conclusion to which no response is required.

5 27. Paragraph 27 states a legal conclusion to which no response is required.

6 28. Paragraph 28 states a legal conclusion to which no response is required.

7 29. Paragraph 29 states a legal conclusion to which no response is required. Paragraph
8 29 also quotes from 5 U.S.C. § 706(2)(A), which is publicly available, speaks for itself, and to
9 which no response is required.

10 30. Paragraph 30 states a legal conclusion to which no response is required. In addition,
11 Paragraph 30 quotes from 33 U.S.C. § 1251(a), which is publicly available, speaks for itself, and
12 to which no response is required.

13 31. Paragraph 31 consists of opinions and legal conclusions to which no response is
14 required. Paragraph 31 also selectively quotes from statutory authority (33 U.S.C. §§ 1311(a),
15 1342, 1344, 1362(7), 1362(12)), which is publicly available, speaks for itself, and to which no
16 response is required.

17 32. Paragraph 32 consists of characterizations, opinions, and legal conclusions to which
18 no response is required. Paragraph 32 also characterizes and selectively quotes from legal
19 opinions that speak for themselves, are the best evidence of their contents, and to which no
20 response is required.

21 33. Paragraph 33 consists of characterizations and legal conclusions to which no
22 response is required. Paragraph 33 also characterizes and selectively quotes from statutory
23 authority and legislative history, which are publicly available, speak for themselves, are the best
24 evidence of their contents, and to which no response is required.

25 34. Paragraph 34 consists of characterizations and legal conclusions to which no
26 response is required. Paragraph 34 also characterizes and selectively quotes from statutory
27 authority, which is publicly available, speaks for itself, is the best evidence of its contents, and to
28 which no response is required.

1 35. Paragraph 35 consists of characterizations and legal conclusions to which no
2 response is required. Paragraph 35 also characterizes and selectively quotes from statutory
3 authority, which is publicly available, speaks for itself, is the best evidence of its contents, and to
4 which no response is required.

5 36. Paragraph 36 consists of characterizations and legal conclusions to which no
6 response is required. In addition, Paragraph 36 cites statutory authority, which is publicly
7 available, speaks for itself, and is the best evidence of its contents.

8 37. Paragraph 37 consists of characterizations and legal conclusions to which no
9 response is required. In addition, Paragraph 37 cites statutory authority, which is publicly
10 available, speaks for itself, is the best evidence of its contents, and to which no response is
11 required.

12 38. Paragraph 38 consists of characterizations and legal conclusions to which no
13 response is required. In addition, Paragraph 38 cites statutory authority, which is publicly
14 available, speaks for itself, is the best evidence of its contents, and to which no response is
15 required.

16 39. Paragraph 39 consists of characterizations and legal conclusions to which no
17 response is required. In addition, Paragraph 39 cites statutory authority, which is publicly
18 available, speaks for itself, is the best evidence of its contents, and to which no response is
19 required.

20 40. Paragraph 40 consists of characterizations and legal conclusions to which no
21 response is required. In addition, Paragraph 40 cites and selectively quotes from statutory
22 authority, which is publicly available, speaks for itself, is the best evidence of its contents, and to
23 which no response is required.

24 41. Paragraph 41 consists of characterizations and legal conclusions to which no
25 response is required. In addition, Paragraph 41 characterizes and selectively quotes from the
26 Federal Register, which is publicly available, speaks for itself, is the best evidence of its
27 contents, and to which no response is required.
28

42. The State Intervenor's admit that the agencies issued a joint legal memorandum on January 15, 2003. Appendix A, "Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of 'Waters of the United States,'" 68 Fed. Reg. 1991, 1996 (Jan. 15, 2003). The State Intervenor's also admit that the EPA issued a guidance memorandum entitled "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*" in December 2008. The remainder of Paragraph 42 consists of characterizations and opinions to which no response is required.

43. Paragraph 43 consists of characterizations and legal conclusions to which no response is required. Paragraph 43 also characterizes certain administrative materials that are publicly available, speak for themselves, are the best evidence of their contents, and to which no response is required.

44. Paragraph 44 consists of characterizations and legal conclusions to which no response is required. Paragraph 44 also characterizes certain administrative materials that are publicly available, speak for themselves, are the best evidence of their contents, and to which no response is required.

45. The State Intervenor's admit that the Agencies promulgated a rule in 2015 defining "waters of the United States" for purposes of the CWA, which became effective on August 28, 2015. The remainder of Paragraph 45 consists of characterizations and legal conclusions to which no response is required.

46. Paragraph 46 consists of characterizations, and legal conclusions to which no response is required. Paragraph 46 also characterizes and quotes from the Federal Register, which is publicly available, speaks for itself, is the best evidence of its contents, and to which no response is required.

47. Paragraph 47 consists of characterizations and legal conclusions to which no response is required. Paragraph 47 also characterizes and selectively quotes from public documents that speak for themselves, are the best evidence of their contents, and to which no response is required. To the extent a response is required, the State Intervenor's deny the allegations in Paragraph 47.

1 48. The State Intervenors admit the President issued Executive Order 13778 entitled
2 “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the
3 United States’ Rule,” which is codified at 82 Fed. Reg. 12,497, in 2017. The remainder of
4 Paragraph 48 characterizes and selectively quotes from the Federal Register, which is publicly
5 available, speaks for itself, and to which no response is required.

6 49. The State Intervenors admit the agencies promulgated the Repeal Rule on October
7 22, 2019, which repealed the earlier 2015 Rule. The remainder of Paragraph 49 characterizes and
8 selectively quotes from the Federal Register, which is publicly available, speaks for itself, and to
9 which no response is required.

10 50. Paragraph 50 consists of opinions, characterizations, and legal conclusions to which
11 no response is required. To the extent a response is required, the State Intervenors admit that
12 coverage of the 2020 Rule is different from that of the 2015 Rule as well as the pre-2015
13 regulatory regime, and further admit that some features covered by those regimes would not be
14 jurisdictional under the 2020 Rule. The State Intervenors deny the remaining allegations in
15 Paragraph 50.

16 51. Paragraph 51 characterizes and selectively quotes from the Federal Register, which is
17 publicly available, speaks for itself, is the best evidence of its contents, and to which no response
18 is required.

19 52. Paragraph 52 consists of characterizations and legal conclusions to which no
20 response is required. In addition, Paragraph 52 characterizes and selectively quotes from the
21 Federal Register, which is publicly available, speaks for itself, is the best evidence of its
22 contents, and to which no response is required.

23 53. Paragraph 53 consists of characterizations and legal conclusions to which no
24 response is required. In addition, Paragraph 53 characterizes and selectively quotes from the
25 Federal Register, which is publicly available, speaks for itself, is the best evidence of its
26 contents, and to which no response is required.

27 54. The State Intervenors admit that the 2020 Rule contains certain exclusions from the
28 definition of “waters of the United States.” The remainder of Paragraph 54 consists of

1 characterizations and legal conclusions to which no response is required. In addition, Paragraph
2 54 characterizes and selectively quotes from the Federal Register, which is publicly available,
3 speaks for itself, is the best evidence of its contents, and to which no response is required.

4 55. The State Intervenor's admit that the 2020 Rule excludes interstate waters as a
5 separate category of "waters of the United States." The remainder of Paragraph 55 consists of
6 opinions and legal conclusions to which no response is required.

7 56. Paragraph 56 consists of opinions, characterizations, and legal conclusions to which
8 no response is required. In addition, Paragraph 56 characterizes and cites from administrative
9 materials that are publicly available, speak for themselves, are the best evidence of their
10 contents, and to which no response is required. To the extent a response is required, the State
11 Intervenor's admit that coverage of the 2020 Rule is different from that of the 2015 Rule as well
12 as the pre-2015 regulatory regime, and further admit that some features covered by those regimes
13 would not be jurisdictional under the 2020 Rule.

14 57. Paragraph 57 consists of opinions, characterizations, and legal conclusions to which
15 no response is required. In addition, Paragraph 57 characterizes and cites from publicly available
16 sources, including administrative materials, which speak for themselves, are the best evidence of
17 their contents, and to which no response is required. To the extent a response is required, the
18 State Intervenor's admit that coverage of the 2020 Rule is different from that of the 2015 Rule as
19 well as the pre-2015 regulatory regime, and further admit that some features covered by those
20 regimes would not be jurisdictional under the 2020 Rule. The State Intervenor's deny the
21 remaining allegations in Paragraph 57.

22 58. Paragraph 58 consists of opinions, characterizations, and legal conclusions to which
23 no response is required. To the extent a response is required, the State Intervenor's deny the
24 allegations in Paragraph 58.

25 59. Paragraph 59 consists of opinions, characterizations, and legal conclusions to which
26 no response is required. In addition, Paragraph 59 characterizes and selectively quotes from legal
27 opinions and the Federal Register, which are publicly available, speak for themselves, are the
28 best evidence of their contents, and to which no response is required.

1 60. Paragraph 60 consists of opinions, characterizations, and legal conclusions to which
2 no response is required. Paragraph 60 also characterizes and selectively quotes from the Federal
3 Register, which speaks for itself, is the best evidence of its contents, and to which no response is
4 required. To the extent a response is required, the State Intervenor deny the allegations in
5 Paragraph 60.

6 61. Paragraph 61 consists of opinions, characterizations, and legal conclusions to which
7 no response is required. To the extent a response is required, the State Intervenor deny the
8 allegations in Paragraph 61.

9 62. Paragraph 62 consists of opinions, characterizations, and legal conclusions to which
10 no response is required. To the extent a response is required, the State Intervenor deny the
11 allegations in Paragraph 62.

12 63. Paragraph 63 consists of opinions, characterizations, and legal conclusions to which
13 no response is required. To the extent a response is required, the State Intervenor deny the
14 allegations in Paragraph 63.

15 64. Paragraph 64 characterizes and selectively quotes from public documents that speak
16 for themselves, are the best evidence of their contents, and to which no response is required.

17 65. Paragraph 65 consists of opinions, characterizations, and legal conclusions to which
18 no response is required. To the extent a response is required, the State Intervenor deny the
19 allegations in Paragraph 65.

20 66. The State Intervenor admit that the agencies engaged with the EPA's Science
21 Advisory Board ("SAB") during the development of the 2020 Rule, including meeting with the
22 SAB prior to and following publication of the proposed 2020 Rule. They further admit that SAB
23 issued a draft commentary on the proposed rule on December 31, 2019, and held a public
24 meeting on the proposed rule on January 17, 2020. The State Intervenor further admit that the
25 agencies signed the final 2020 Rule on January 23, 2020. The remaining allegations in Paragraph
26 66 consist of opinions to which no response is required.

27 67. Paragraph 67 consists of characterizations and legal conclusions to which no
28 response is required. Paragraph 67 also characterizes and selectively quotes from certain public

1 materials which speak for themselves, are the best evidence of their contents, and to which no
2 response is required.

3 68. Paragraph 68 consists of opinions and characterizations to which no response is
4 required. Paragraph 68 further selectively quotes from the Federal Register, which is publicly
5 available, speaks for itself, is the best evidence of its contents, and to which no response is
6 required. To the extent a response is required, the State Intervenor deny the allegations in
7 Paragraph 68.

8 69. Paragraph 69 consists of opinions, characterizations, and legal conclusions to which
9 no response is required. To the extent a response is required, the State Intervenor deny the
10 allegations in Paragraph 69.

11 70. Paragraph 70 consists of opinions, characterizations, and legal conclusions to which
12 no response is required. To the extent a response is required, the State Intervenor deny the
13 allegations in Paragraph 70.

14 71. Paragraph 71 consists of opinions, characterizations, and legal conclusions requiring
15 no response. To the extent a response is required, the State Intervenor admit that coverage of the
16 2020 Rule is different from that of the 2015 Rule as well as the pre-2015 regulatory regime, and
17 further admit that some features covered by those regimes would not be jurisdictional under the
18 2020 Rule. The State Intervenor deny the remaining allegations in Paragraph 71.

19 72. Paragraph 72 consists of opinions, characterizations, and legal conclusions to which
20 no response is required. In addition, Paragraph 72 cites and selectively quotes from the Federal
21 Register, which is publicly available, speaks for itself, and is the best evidence of its contents. To
22 the extent a response is required, the State Intervenor deny the allegations in Paragraph 72.

23 73. Paragraph 73 consists of opinions, characterizations, and legal conclusions to which
24 no response is required. To the extent a response is required, the State Intervenor deny the
25 allegations in Paragraph 73.

26 74. Paragraph 74 consists of opinions and characterizations to which no response is
27 required. Paragraph 74 also characterizes the Federal Register, which is publicly available,
28

1 speaks for itself, and is the best evidence of its contents. To the extent a response is required, the
2 State Intervenor deny that the allegations in Paragraph 74.

3 75. Denied.

4 76. The State Intervenor admit that the Plaintiffs' jurisdictions cover vast areas of the
5 country, and that Plaintiffs are geographically situated along some of the Nation's waters. The
6 State Intervenor further admit that the Plaintiffs have authority to address water pollution
7 generated by sources within their borders, and that they do not have authority to directly regulate
8 water pollution generated by sources outside of their borders. The State Intervenor lack
9 sufficient knowledge to respond to the remainder of the allegations in Paragraph 76.

10 77. The State Intervenor lack sufficient knowledge to respond to the allegation that the
11 Plaintiffs rely on uniform nationwide pollution controls. The State Intervenor deny that the
12 Plaintiffs will suffer the harm under the 2020 Rule, and deny the remaining allegations in
13 Paragraph 77.

14 78. Paragraph 78 consists of opinions, characterizations, and legal conclusions to which
15 no response is required. To the extent that a response is required, the State Intervenor deny the
16 allegations in Paragraph 78.

17 79. Paragraph 79 consists of opinions, characterizations, and legal conclusions to which
18 no response is required. In addition, Paragraph 79 characterizes and cites certain public
19 documents that speak for themselves, are the best evidence of their contents, and to which no
20 response is required. To the extent a response is required, the State Intervenor admit that
21 coverage of the 2020 Rule is different from that of the 2015 Rule as well as the pre-2015
22 regulatory regime, and further admit that some features covered by those regimes would not be
23 jurisdictional under the 2020 Rule. Further, to the extent a response is required, the State
24 Intervenor deny the remaining allegations in Paragraph 79.

25 80. Paragraph 80 characterizes and selectively quotes from certain publicly available
26 materials which speak for themselves, are the best evidence of their contents, and to which no
27 response is required. The State Intervenor lack sufficient knowledge to respond to the remaining
28 allegations in Paragraph 80.

1 81. Paragraph 81 consists of opinions and legal conclusions to which no response is
2 required. The remainder of Paragraph 81 characterizes and selectively quotes from
3 administrative materials, which are publicly available, speak for themselves, are the best
4 evidence of their contents, and to which no response is required.

5 82. Paragraph 82 consists of characterizations and legal conclusions to which no
6 response is required.

7 83. Paragraph 83 consists of opinions, characterizations, and legal conclusions requiring
8 no response. Paragraph 83 further characterizes and selectively quotes from certain publicly
9 available documents which speak for themselves, are the best evidence of their contents, and to
10 which no response is required. To the extent a response is required, the State Intervenor deny
11 that the 2020 Rule risks more damage from oil spills.

12 84. The State Intervenor lack sufficient knowledge to respond to the allegations in
13 Paragraph 84 pertaining to the effect of the 2020 Rule on the Plaintiffs' regulatory programs, the
14 internal governance or appropriation decisions of the Plaintiffs, or any reliance by the Plaintiffs
15 on federal regulations. The State Intervenor further deny that the agencies failed to consider the
16 Plaintiffs' purported reliance interests in the 2020 Rule, and deny that 2020 Rule abandons the
17 agencies' long-standing position and policy.

18 85. Paragraph 85 consists of opinions, speculation, and legal conclusions to which no
19 response is required. To the extent a response is required, the State Intervenor deny the
20 allegations in Paragraph 85.

21 86. The allegations in Paragraph 86 consists of opinions and speculation to which no
22 response is required. To the extent a response is required, the State Intervenor deny that the
23 2020 Rule will impair water recreation industries, deny that the 2020 Rule will make water less
24 desirable for fishing, boating, or swimming, and further deny the remaining allegations in
25 Paragraph 86.

26 87. The State Intervenor admit that Plaintiffs own, operate, finance, or manage property
27 within their borders. The remaining allegations in Paragraph 87 consist of opinions and legal
28 conclusions to which no response is required. To the extent a response is required, the State

1 Intervenor deny that the 2020 Rule impairs Plaintiffs' proprietary interests, deny that the 2020
2 Rule will destroy habitat or reduce wildlife populations, and deny that the 2020 Rule will allow
3 increased pollution or loss of wetland functions. The State Intervenor lack sufficient information
4 to respond to the remaining allegations in Paragraph 87.

5 88. The State Intervenor deny Plaintiffs are entitled to the relief requested and deny
6 Plaintiffs will suffer any injury caused by the 2020 Rule.

7 The allegations following Paragraph 88 are legal statements of causes of action and a
8 prayer for relief to which no response is required.

9 **GENERAL DENIAL**

10 If any factual allegation in the Complaint has not been admitted or specifically responded
11 to, the State Intervenor deny such allegation.

12 **DEFENSES**

13 1. Plaintiffs have failed to state a claim for which relief can be granted with respect to
14 one or more of the claims set forth in the Complaint.

15 2. The State Intervenor reserve the right to raise any defense, including but not limited
16 to those found in Federal Rules of Civil Procedure 8(c) and 12, that may be supported by the
17 record in this case.

Respectfully submitted.

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*Application for Admission Pro Hac Vice Pending or Forthcoming

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2020, I served this proposed answer by filing it with this Court's ECF system.

/s/ Andrew A. Pinson
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